No. 14,122

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Reply Brief of Appellee

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Reply Brief of Appellee

This is a case arising out of a scheme to recover gold from the bed of the ancient Tuolumne River in Stanislaus County, California. Tuolumne Gold Dredging Corporation (herein called Tuolumne) owned part of the land and held options on other parts which were to be dredged. Most of its capital had been spent in acquiring land and in exploration. Walter W. Johnson Company (herein called Johnson) was in the dredge building business and made arrangements with Tuolumne which led to a contract to build a dredge to mine the land. Reconstruction Finance Corporation (herein called RFC) agreed to loan Tuolumne

money for its venture. The details of the relationships between the parties are developed later in this brief.

After the dredge was built, a dispute arose between Tuolumne and Johnson, Tuolumne claiming the dredge was unable to perform properly and Johnson claiming it had not been paid in full. While litigation between them went on for several years the dredge was operated, though not full-time during the curtailment of gold mining operations during World War II. Eventually the land was dredged so far as feasible and, the operation as a whole being unprofitable, Tuolumne was left with a huge debt to RFC and a substantial judgment against it in favor of Johnson. RFC then brought an action against Tuolumne to foreclose its mortgage, also naming as formal parties the trustee under the trust indenture and chattel mortgage and Johnson and Johnson's bonding company because of their interest in the judgment against Tuolumne. Johnson then filed what the District Court uniquely described as a quinquefoliate counterclaim against RFC, in which it sought a money judgment for the same items which were already the subject of its judgment against Tuolumne.

Except for some omissions, which we will shortly mention, the manner in which this action reached the present state in litigation has been adequately set forth by appellant. To complete the history of the case it should be added that, after summary judgment was granted on Johnson's counterclaim, application was made for default judgments against defendants, other than Johnson, and a second motion for summary judgment, on RFC's complaint, was made. The latter motion was duly submitted to and granted by the Court. No appeal has been taken from the judgment entered after the granting of the second motion, and judgment on the complaint has been entered and has become final. The documents pertaining to this phase of the case are not included in the written transcript of record on this appeal as appeal was taken only from the judgment against Johnson on its counterclaim. They are referred to only in the Certificate of Clerk to Record on Appeal. (Tr. 447-8)

It does not appear in the transcript on appeal but it is of record in the District Court that, pursuant to the Judgment and Decree of Foreclosure and Sale, the property of Tuolumne, including both the land and the dredge, has been sold at public auction by a special master appointed by the District Court. A final decree has been entered which approved the sale and which directed the special master to execute a deed and bill of sale conveying the property to RFC, the purchaser at the public sale. The final decree bars the defendants, including Johnson, and all persons claiming under them from ever asserting any right or equity of redemption, and from claiming any right, title or interest in or to, or any lien upon the property, or any part thereof. The deed and bill of sale conveying the property to RFC, as purchaser, were prepared and delivered pursuant to the decree.

Johnson ignored all proceeding after the summary judgment on plaintiff's complaint was granted.

This additional history of the litigation has been referred to because the judgment entered on RFC's complaint finally and conclusively disposes of all issues. It adjudicated exactly the same issues involved in Johnson's counterclaim and Johnson is barred under the principles of res judicata from re-litigating the same issues. We will first answer Johnson's brief and then discuss this new defense.

STATEMENT OF THE CASE

In determining whether or not there is any genuine issue of fact requiring a trial, there is a unique feature in this case which should be kept foremost in the mind of the Court, that is, that everything upon which the motion for summary judgment was made and granted was admitted to be true by Johnson. All the facts which were relied on before the District Court and all the facts which are relied on in the judgment of the District Court are admitted by Johnson. The admissions obtained from Johnson by

stipulation or through discovery processes were so complete that it was unnecessary for RFC to offer a single affidavit. If there are any conflicts in the record they are only the self-contradictions of Johnson. Self-contradictions by one party do not create genuine issues of fact between the opposing parties.

Rather than restate the case completely we will merely correct, where necessary, some inaccuracies in Johnson's brief. These inaccuracies do not indicate issues of fact, however. They are merely a result of misunderstanding or misinterpretation.

At the bottom of page 2 it is stated that Tuolumne and Johnson negotiated their contract after RFC had resolved to loan Tuolumne money. This is presumably part of the "broad factual background" Johnson relies on. The record shows that the statement is inaccurate. Johnson and Tuolumne had planned and negotiated together for months before RFC decided to loan Tuolumne money. They had proceeded so far as to have a contract between them drafted for the construction of the dredge seven months before the loan was made. Before that Johnson had made suggestions for further prospecting of the ground, after RFC had first refused the application for a loan. Johnson located and recommended key employees for Tuolumne during its preliminary work. Johnson spent months in drafting plans and specifications for the dredge before the loan was made. Johnson even loaned Tuolumne $20,000 or $25,000 and loaned McDonald, Tuolumne's president, $6000 personally. Johnson and Tuolumne were so closely allied and had carried their joint efforts so far that RFC found it necessary to warn Johnson on February 2, 1937, (Tr. 134-5) that it had no responsibility in the arrangements between Johnson and Tuolumne. (See deposition of Walter W. Johnson, Tr. 284, 286, 290, 291, 294, 295, 297, 300, 306, 307, 313, 326-7, 347, 357-8, 360-2, 365, 370, etc. and exhibits attached to the deposition. Exhibit 9, Tr. 441, refers to a contract of October 29, 1936, although it states 1937. The error as to date was corrected at Tr. 378.)

It was not until shortly before the indenture between Tuolumne and RFC was executed that RFC had any opportunity to examine the Johnson-Tuolumne contract to satisfy itself that its terms did not conflict with or infringe upon the proposed trust indenture.

Johnson emphasizes RFC's interest in the construction contract, but such interest is a logical and necessary one on the part of a money lender. A loan agency must scrutinize a construction contract to see that the money it lends is not to be spent profligately. Such care on its part does not make it an obligor on such a contract. Nor does it give the contractor any rights against the lender. The most reasonable step a lender can take is to ascertain, before a loan is made, what kind of a deal the borrower is entering. RFC took such a part in the Johnson-Tuolumne affair, but the record shows that it dealt with each at arm's length. RFC did not become a party to the construction contract and Johnson was not an obligee or a beneficiary of the trust indenture. It is important to note that through Johnson's shrewdness, and by reason of its independence in bargaining, it protected itself in its construction contract with Tuolumne by inserting a provision that it would not be bound on that contract until Tuolumne actually received the first advance on the RFC loan. (Article XVI, Tr. 205)

It is stated on page 3 of the brief that RFC and Tuolumne depleted the construction fund and that they expended it for other purposes. It is a fact that the construction fund was spent. Whether there was anything wrongful about it is a matter of legal argument, not a question of fact, which will be dealt with later.

It is also claimed that RFC improperly advanced money to Tuolumne for the purpose of contesting its litigation with Johnson. This claim is untrue, but is immaterial here and will be ignored.

Beginning on page 6 of the brief are a series of argumentative statements with which we disagree. In doing so, however, we take issue only on the interpretation and legal significance of the

facts. The facts themselves have been admitted by Johnson. No genuine issue of fact is created simply because the parties disagree as to their legal significance or effect. There may be room for legal argument, but, where the facts are proved in their entirety by Johnson's admissions or stipulations, self-contradictions appearing by way of self-serving statements do not create genuine issues between the parties.

It is asserted that Johnson relied on RFC. It is broadly implied that RFC guided Johnson into its transaction with Tuolumne. These assertions are not accurate. The facts are that all of the parties acted independently, as is plain from the written agreements. If any two of the three worked in collusion, Johnson and Tuolumne were the pair. Johnson did not come into the affair at the last minute as an innocent party called from the sidelines. As mentioned above, it assisted Tuolumne for about two years in the preliminary work which was necessary before a loan could be made. Johnson even took an active part in assisting Tuolumne in convincing RFC that the whole dredging project would be practicable and profitable after RFC had once refused a loan.

It is unnecessary to go into any more factual detail. The negotiations resulted in two lengthy and unambiguous documents which superseded everything that had gone before. Those documents fixed the relationship of the parties. They are before the Court and no one has suggested that their meaning and intent cannot be determined from reading them. Indeed, under the well-settled parol evidence rule their meaning must be determined from the written provisions. Where the parties have reduced to writing all of the terms of an agreement between them, oral evidence cannot be used to change those terms. *St. Paul F. & M. Ins. Co. v. Balfour,* 168 F. 212 (C.A. 9, 1909); Restatement of Contracts, § 237. There are some exceptions to the rule, but Johnson did not plead any and has made no showing by way of affidavit or otherwise that the agreement between RFC and Tuolumne on the one

hand, or the agreement between Johnson and Tuolumne on the other, is anything other than what appears in the respective documents.

The gravamen of every claim Johnson makes is that the use of the construction fund was limited to payment for the dredge or that at least a portion of the fund equal to the amount due under the Johnson-Tuolumne construction contract was so limited. The answer to this is the terms of the indenture. An examination will reveal no exclusive dedication of the construction fund or any ascertainable part of it to the purpose of paying Johnson. On the contrary the trust indenture permits the widest possible application of the construction fund. RFC protected itself, not by dedicating the loan fund to certain narrow purposes as some lenders have done, but by retaining a veto power on expenditures from the fund. It is true that some specific uses and the general purpose of the loan are set forth, but these are followed by the phrase "and to provide Trustor (Tuolumne) with working capital." (Tr. 18) The term "working capital" is so broad that the use of the fund for any corporate need of Tuolumne is within its meaning.

It is correctly stated that $510,000 was paid to Johnson, but the argument that RFC "caused payments" is misleading. The fact is that payments to Johnson were made pursuant to the construction contract, as Johnson has stipulated. (Tr. 187) It is also admitted that the payments were made between June 15, 1937 and May 28, 1938. (Tr. 119-20)

Johnson tries to make much of RFC's offer to approve a payment of an additional $40,000 to Johnson from the loan fund. The offer has no significance as a basis of liability. It is elementary that negotiations and attempts to settle litigation are not evidence of liability. The occurrence simply shows that RFC would not have prevented a settlement of the differences between Tuolumne and Johnson, even though the amount due Johnson under the terms of

the contract, after credit to Tuolumne for items not furnished an under the penalty clause, was less than the amount discussed.*

On page 8 and elsewhere in the brief Johnson refers to what i calls "obligations" of RFC to Johnson. It will be demonstrate herein that each and every theory Johnson suggests to support such obligations is lacking in legal validity. This again, is a matter o argument on the legal significance of the facts. It is not a disput over the facts themselves.

We need not discuss the Johnson-Tuolumne litigation. It i irrelevant. RFC was not a party to it and for that reason nothing determined therein is binding upon it.

Johnson refers at page 10 to its allegation that "in addition * * * RFC appropriated 11 years of earnings of the dredge." Apparently it is thought that some opprobrious connotation is to be inferred from the use of the word "appropriated." The facts are not in dispute that RFC was paid out of earnings of the dredge. As Johnson has stipulated, the second loan was repaid in its entirety with interest and part of the first loan was repaid, all in accordance with the terms of the trust indenture from earnings of the dredge.† (Tr. 182-3, 184-5) The facts themselves are not challenged; Johnson simply argues that the legal conclusion ought to be drawn that the payments were not lawful.

---

*The facts show that Johnson could claim at most about $33,000 on the contract. (Interrogatory No. 24, Tr. 104; and Answer 24, Tr. 118). Of the $552,500 maximum, $510,000 was paid and credits of over $9,000 were allowed Tuolumne. Everything that Johnson claims beyond that amount is outside of the construction contract, and, even under Johnson's theory, was not contemplated as a charge under the construction contract. There is not the flimsiest justification for considering Johnson as anything but a general credit of Tuolumne for anything in excess of about $33,000 (without considering the possibility of interest). Assuming that Johnson once had a special claim on the loan fund for payments due under the construction contract, its other claims were not entitled to that same benefit.

†The arrangement between RFC and Tuolumne was known to all concerned as a "self-liquidating" project, i.e., the loan was to be paid out of the earnings. Johnson was fully aware of this before it contracted with Tuolumne.

Next it is asserted, as though a trump card were being played, that RFC made "excuses" to Johnson for not paying it and that one or another of the employees of RFC said that RFC would arrange to pay the Johnson Company. We will examine the purported promise later in this brief to determine whether a legal obligation could arise in that manner. At this point we merely ask the Court to consider how incredible it would be that a governmental agency would so casually undertake, without any written record, an obligation to pay a claim of over fifty thousand dollars in a conversation between an engineer employed by it and the representative of a company which was competing with RFC as a creditor of a debtor company which owed the government nearly half a million dollars. Not only was Johnson's claim questionable at all times, but it was in litigation between Johnson and the debtor at the very time that the alleged promise was supposed to have been made. It is so fantastic on its face that it is inherently unbelievable.

However, we do not depend on the absurdity of Johnson's claim to support the judgment of the District Court. Johnson's own admissions prove it to be untrue. Again, we point out that this is no genuine issue of fact. Rather, Johnson's grandiose conclusions that RFC had promised to pay Tuolumne's debt to it is categorically disproved by factual admissions of Johnson. Whatever may be Johnson's recollections of conversations which occurred twelve or fifteen years ago, the documentary evidence shows that RFC did not at any time undertake an obligation to pay it. Time after time it tried to get RFC to pay what Tuolumne allegedly owed, but just as often it was turned down in plain and unmistakable terms.

A review of the correspondence attached to the Requests for Admissions shows indisputably that RFC did not promise to pay Johnson anything. Beginning with the letter of February 2, 1937, (Tr. 134) which has already been referred to, a letter written

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A review of the correspondence attached to the Requests for Admissions shows indisputably that RFC did not promise to pay Johnson anything. Beginning with the letter of February 2, 1937, (Tr. 134) which has already been referred to, a letter written

before the indenture and construction contract were entered into, RFC kept itself free from entanglement in the Johnson-Tuolumne relationship. As soon as the dredge was built, Johnson clamored for final payment and Tuolumne claimed that the dredge was defective. Johnson tried then to bring RFC into the controversy, but on August 28, 1938, RFC notified Johnson that controversies between it and Tuolumne concerning their contract must be settled between the contracting parties. (Ex. 3, Tr. 136)

Early the next year Johnson asked RFC for information concerning the loan fund, for it had received word that it was being used for other purposes than payment to Johnson. RFC put Johnson on notice again that it would not enter the controversy, by advising Johnson to seek information from Tuolumne directly. (Ex. 4, Tr. 137; Ex. 5, Tr. 138)

On May 29, 1941, Johnson proposed a settlement. (Ex. 10, Tr. 143) On July 9, 1941, Johnson was advised by RFC that its proposal was not acceptable. (Ex. 11, Tr. 146)

A year and a half later, on January 18, 1943, Johnson tried again. On this occasion it asserted practically the same claims now embodied in its counterclaim. It requested a loan from RFC and offered "to halt all other further action until after the appeal" of Tuolumne in the state court action between Johnson and Tuolumne. (Ex. 13, Tr. 151) On January 27, 1943, RFC rejected the proposal. (Ex. 14, Tr. 156) Johnson was advised that RFC would take no action to involve itself in the Johnson-Tuolumne litigation. RFC would not recommend payment for supplies claimed to have been furnished outside of the construction contract, for that claim was a part of the litigation. RFC stated that it would consider a recommendation or requisition, if one were made by Tuolumne, regarding the sales tax on the dredge. There was no promise to pay such sales tax out of RFC's funds or even a promise to preserve part of the earnings of the dredge for that purpose.

The next year Johnson tried again. On June 30, 1944, it wrote RFC, after furnishing it with a legal memorandum prepared by its attorney. (Ex. 15, Tr. 158) At that time Johnson requested RFC to furnish the money to Tuolumne to pay the judgment Johnson had obtained in the State Court action. The judgment covered all of the items now the subject of the counterclaim except the sales tax. The same arguments were made in the letter in 1944 that are made in Johnson's brief on this appeal. In RFC's reply on July 29, 1944, Johnson was advised that RFC recognized no liability either for the amounts supposed to be due under the construction contract or on the sales tax claim. It was called to the attention of Johnson that Tuolumne was in default in payments to RFC. (Ex. 16, Tr. 164) Then Johnson threatened to execute on its judgment against Tuolumne's property, but nothing came of that. (Ex. 18, Tr. 166) Johnson's attorney talked to certain RFC employees about such threatened execution or garnishment, but RFC did not commit itself to the means it would take to protect its interests. (Request for Admission No. 19, Tr. 129; Answer No. 19, Tr. 169; Ex. 19, Tr. 167)

Another effort by Johnson to get RFC to pay what Tuolumne allegedly owed was made by Johnson's attorney in October, 1947. RFC again refused to pay Johnson anything. (Request for Admission No. 21, Tr. 139; Answer No. 21, Tr. 169)

A couple of years later Johnson brought the matter up again (Tr. 230) but no promise was made by RFC. Johnson's attorney conferred with an attorney for RFC who informed him he could not recommend any payment. (Tr. 239)

Finally, in 1951, Johnson offered to buy out RFC's claim against Tuolumne. (Ex. A, Tr. 221) RFC made two counteroffers, neither of which was accepted. (Ex. B, Tr. 224; Ex. C, Tr. 225) By that time this action had been on file for two years.

This documentary evidence is not contested or explained in any way by Johnson. The documents themselves show conclusively

that Johnson was never treated as anything but a competing creditor whose claims against Tuolumne were a threat to recovery by RFC of its loan. Johnson was held at arm's length and was never led to neglect or forego any legal rights or remedies it might have had. In none of the documents is there any statement which could possibly be tortured into a promise by RFC to pay the debts, if any, owed Johnson by Tuolumne. The only thing that held Johnson back from suing RFC or from attempting to proceed directly against Tuolumne's property was Johnson's own lack of confidence in the validity and enforceability of its claims. It hoped to accomplish through threat, plea and negotiation what it knew it could not in a lawsuit. Johnson was simply trading on its nuisance value, which it greatly overrated.

Johnson's "reliance" on alleged oral requests or promises by RFC's employees is unbelievable in view of the undisputed facts of the documents just outlined. The truth of the matter is that every conference between a representative of Johnson and an employee of RFC was followed up by correspondence, which Johnson admits to be authentic. The correspondence shows that, whatever understanding or misunderstanding anyone may have had about what was said orally, the exchange of letters put the record straight between them every time. Those letters show that as often as Johnson renewed its pleas, RFC refused them. RFC neither undertook nor promised to undertake to pay Johnson, either from its own funds or from funds of Tuolumne.

Johnson argues that a "long and continuous relationship" and a "broad factual background" could be shown if there were a trial of this case. The argument fallaciously assumes that legal liability could somehow be created thereby without making some respectable showing how or why the written documents, particularly the correspondence between the parties and the two basic agreements, the indenture and the construction contract, can be disregarded or sufficiently changed in meaning to achieve that liability. Johnson

has not made any showing that the documents mean anything other than what they say and the documentary evidence in this case makes it impossible for Johnson to raise a factual issue. That is why the District Court acted entirely with propriety in granting a summary judgment.

It is argued that counsel for RFC made some concession as to the validity of Johnson's claims by inquiring at length through discovery processes into the factual background of Johnson's claims. If that argument had any merit, the value of discovery would be lost. It is also argued that it is inconsistent to urge that no genuine issue as to a material fact exists after making such inquiry. The answer to this is quite plain. The results of the discovery processes demonstrated convincingly that Johnson's claims were baseless. Despite considerable probing nothing could be discovered to support them. It became evident from the information obtained through stipulation and admission that Johnson could develop no genuine issue of fact.

Before turning to the arguments in support of Johnson's specifications of errors, the Court's attention is directed to the state of the pleadings. The allegations of paragraphs I, II, III, IV, V, VI, IX, X and XI of the complaint are admitted in paragraph I of Johnson's answer and in sections 1, 2, 3, 4 and 5 of the Agreed Statement of Facts. Paragraphs VII and VIII of the complaint are not material on this appeal.

The allegations of paragraph XII of the complaint are denied in Johnson's answer but are admitted in the last part of section 5 of the Agreed Statement of Facts. The allegations of paragraph XIII of the complaint are also denied in the answer but are admitted in section 6 of the Agreed Statement of Facts. The allegations of paragraph XIV of the complaint are admitted in paragraph III of the answer and in section 7 of the Agreed Statement of Facts.

The allegations of paragraph XV are admitted in part and denied in part in paragraph IV of the answer. Said paragraph IV

affirmatively alleges that Johnson has right, title and interest and lien senior to the lien of RFC and the allegations of Johnson's counterclaim are incorporated by reference in paragraph IV of the answer to the complaint.

The allegations of paragraph I of the second cause of action in RFC's complaint are admitted in paragraph V of Johnson's answer and in the Agreed Statement of Facts, said paragraph I being repetitive of the first nine paragraphs of RFC's first cause of action. The allegations of paragraphs II and III of RFC's second cause of action are admitted in part in paragraph VI of Johnson's answer and the remainder of such allegations are admitted in section 8 of the Agreed Statement of Facts. The allegations of paragraph IV of RFC's second cause of action are admitted in part in paragraphs III and IV of Johnson's answer and in section 7 of the Agreed Statement of Facts, with the exception, as in the first cause of action, of Johnson's affirmative allegation that it has right, title, interest and lien senior to the lien of RFC and with the same reference to Johnson's counterclaim.

The only allegation of the complaint not admitted in the answer or the Agreed Statement of Facts was the allegation of paragraph XV that any right, title, interest or lien of any defendant is junior and subordinate to the lien of RFC's indenture and chattel mortgage. Whether the RFC lien was senior became exclusively a question of law when the facts were all admitted.

Johnson affirmatively pleaded one other matter. It is alleged in paragraph VIII of the answer that, by reason of the acceptance by RFC of the net proceeds of the operation of the dredge and repayment thereby of the second loan, RFC violated the rights of Johnson and is estopped from asserting the validity of its lien under the first indenture and chattel mortgage. Facts relevant to such allegations are stipulated in parts 10 and 11 of the Agreed Statement of Facts. Whether an estoppel arose is also exclusively a question of law since Johnson has admitted the determinative facts.

In its first cause of counterclaim Johnson claims to be a third party beneficiary of the indenture and chattel mortgage. In its second cause of counterclaim Johnson asserts that it is entitled to a lien superior and senior to any lien of the RFC. (The type of lien is not specified.) In the third cause of counterclaim Johnson alleges that RFC has been unjustly enriched in that it received the proceeds of the operation of the dredge without paying a payment to Johnson for the dredge." In the fourth cause of counterclaim it is alleged that RFC "in fraud" of Johnson's rights "appropriated to itself all of the proceeds of the operation of the dredge and applied them to discharge" a junior encumbrance (the second mortgage). In the fifth cause of counterclaim Johnson alleged that it had to pay a sales tax on the dredge and that RFC "admitted the amount of such tax as above alleged was due and payable to Johnson" under the construction contract.

We respectfully submit that the only issues are legal, not factual. The parties dispute the legal conclusions to be drawn from the facts, thus presenting the classic setting for summary disposition.

THE DISTRICT COURT ACTED WITHIN THE SCOPE OF ITS POWERS IN GRANTING SUMMARY JUDGMENT

Appellee complains bitterly that summary judgment was granted "on the merits" as well as on the procedural defense of limitations. The complaint is unjustified. The effect of the disposition of a case on a motion to dismiss or for summary judgment is exactly what appellant claims it should not be—*an adjudication of the merits. Suckow Borax Mines Consol. v. Borax Consolidated,* 185 F.2d 196 at 205, (C.A. 9, 1950).

The *Borax* case also holds that affirmative defenses such as the statute of limitations not appearing on the face of the complaint (counterclaim in this case) may be established upon a motion to dismiss or for summary judgment when, by affidavits, depositions

and admissions, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law.

This Court has specifically held that a party against whom a counterclaim is asserted may move for summary judgment under Rule 56 at any time. *Gifford v. Travelers Protective Association of America,* 153 F.2d 209 (C.A. 9, 1946). The *Gifford* case also holds that summary judgment may issue when the defense is that of laches. That defense may present only a question of law, which can be disposed of by summary judgment. *Monroe v. Ordway,* 103 F.2d 813, (C.A. 8, 1939); *Dixon v. American T. & T. Co.,* 159 F.2d 863, (C.A. 2, 1947), cert. den. 332 U.S. 764, reh. den. 332 U.S. 839, reh. den. 332 U.S. 856, reh. den. 333 U.S. 850.

When a case is at issue and there is no dispute as to any material fact and the facts have been stipulated through a series of pretrial hearings and the plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment should be granted. *Noble v. Kavanagh,* 66 F. Supp. 258, (D.C. Ohio, 1946) aff'd. 160 F.2d 104 (C.A. 6, 1947).

RFC, as defendant on Johnson's counterclaim, produced evidence through discovery processes and stipulation which was all admitted to be true. That evidence, if believed, was sufficient to entitle RFC to a directed verdict if the case had been tried before a jury; there being no conflicting evidence, a jury could not disregard it. That is a sufficient test for summary judgment. Johnson had an opportunity to show that the evidence was untrue or to explain it away or to show the Court that other evidence could be adduced which would change the result. It did none of these things. All it could muster was some affidavits which barely touch on the material issues and do not detract from the admittedly true facts which show that RFC is entitled to judgment as a matter of law. Under those circumstances summary judgment was appropriate. See *Gifford v. Travelers, etc.,* at page 211.

The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended ones.

When a general statement in pleadings is shown by specific facts to be untrue and the facts thus presented are not denied and are not of such nature as to be purely within the knowledge of the affiant, there is no genuine issue remaining for the trial of the facts. See *Suckow etc. v. Borax, etc.,* at page 205. Similarly, when the ony conflict, if such it be, is a self-contradiction between generalized conclusions of an individual and documents written at the time of the critical events, the authenticity of which documents the individual admits, no *genuine* issue of facts exists.

The tests stated in *Whitaker v. Coleman,* 115 F. 2d 305 (C.A. 5, 1940), cited several times by Johnson, may be applied to the affidavits filed in opposition to the motion for summary judgment. In order to create an issue of fact such affidavits must neither be (a) statements concerning immaterial matters, (b) too incredible to be accepted by reasonable minds, or (c) if true, lacking in legal probative force.

The affidavit of Mr. Walter W. Johnson does not meet these tests. Mr. Johnson stated at some length therein his views as to certain events preceding the execution of the trust indenture and chattel mortgage between RFC and Tuolumne and the execution of the Johnson-Tuolumne construction contract. The apparent purpose of the statements is to persuade the Court to accept the interpretation which Johnson would place upon the two documents. We submit that the documents speak plainly for themselves. No reason has been shown why the written words should be disregarded. Interpretation of each document is a legal question which the Court can determine from within its four corners.

It is quite clear from Mr. Johnson's own recitation of events prior to May 11, 1937, that Johnson and Tuolumne collaborated for a long time in a joint effort to persuade RFC to loan Tuolumne money. If the arrangement was such between RFC, Tuolumne and Johnson that Johnson was to have rights against RFC, Johnson was fully aware of the problems and should have taken oc-

casion while the documents were being prepared to make certain that the trust indenture and chattel mortgage gave it the rights which it now claims.

Mr. Johnson's affidavit contains his views as to the Johnson-Tuolumne litigation and his conclusions about certain statements by employees of RFC to the effect that no payment could be made to Johnson until the litigation was terminated. No contract binding RFC to pay Johnson any debts owed by Tuolumne could possibly be derived from these statements of Mr. Johnson. The affidavit lacks probative force in this respect. Mr. Johnson also refers to the efforts made by the Johnson Company to have RFC bail it out by paying the judgment Johnson had obtained against Tuolumne. No enforceable contract requiring RFC to do so could possibly be derived from these statements.

Finally, Mr. Johnson refers to the efforts of the Johnson Company to buy out the RFC claims against Tuolumne in 1951. This matter has already been discussed and requires no further comment.

The affidavit of Mr. Harley Hise refers solely to efforts on behalf of the Johnson Company in 1947 to have the RFC pay to Johnson what Tuolumne owed it. RFC refused to do so and Mr. Hise agrees that RFC refused to pay. There is absolutely nothing in the affidavit which indicates that RFC ever made any promise or representation to Johnson that it would pay or was obligated to pay to Johnson what Tuolumne owed it. Any facts stated in the letter attached to Mr. Hise's affidavit are not vouched for by Mr. Hise. The affidavit merely states that the letter was written to him on August 4, 1949, and that the exhibit is a copy of what Mr. Smith, who was Johnson's attorney, wrote.

The affidavit of Mr. Smith fails to raise a question of fact. It concerns itself first with irrelevant hearsay statements concerning the means by which attorneys for Tuolumne were paid. The statements are incorrect, as is apparent from Mr. Kelly's

affidavit and from the express terms of the indenture and the chattel mortgage, but they are immaterial and we need waste no time with them. Money used by Tuolumne, either for operation expenses or for the purpose of protecting itself in litigation had to come from the trust fund, which was subject to RFC's veto power as it was part of the security for the loan. It was Tuolumne's money, nevertheless, and RFC could hardly render the struggling debtor defenseless by refusing to allow it to use its own funds to pay costs of litigation. Furthermore, the trust fund into which the earnings of the dredge were deposited was a different fund from the construction fund and Johnson had only the claim of a general creditor against the trust fund.

The Smith affidavit next refers to attempts by representatives of Johnson to get RFC to pay Johnson money which it was unable to collect from Tuolumne. We have already reviewed Johnson's efforts over a period of 13 years to persuade RFC to give it some money. Mr. Smith simply replows some of the same ground. His affidavit indicates at most that on occasion there were some differences of opinion among employees of RFC as to whether or not Johnson's claim had any merit. Nothing in Mr. Smith's affidavit indicates that RFC ever determined that the claim had enough merit to warrant any promise or representation to Johnson that RFC would pay it. Nothing in the Smith affidavit indicates that the correspondence which has been discussed above does not truthfully set forth the series of refusals by RFC to all of the requests by Johnson. Throughout the entire period Johnson was free at any time to pursue its legal remedies, if any, against either RFC or Tuolumne in order to protect whatever rights it may have had. It was not impeded or delayed by RFC on any occasion.

The affidavit of Mr. William T. Kelly requires little comment. Nothing stated therein raises an issue of fact. Mr. Kelly's opinions, interpreting some events, change nothing. The documents which

resulted from the negotiations for the RFC loan and from the negotiations between Johnson and Tuolumne for the building of the dredge speak for themselves. Mr. Kelly's statement is confusing in paragraphs 4 and 5 in its references to the "trust fund." He meant to say "construction fund." As is clear from the terms of the trust indenture and chattel mortgage, money advanced by RFC under the loan was placed in the construction fund. The trust fund came from the earnings of the dredge and was the fund from which RFC received what repayments were forthcoming. The reference in paragraph 6 of Mr. Kelly's affidavit to the trust fund is correct for that reason. The Kelly affidavit also shows what happened to the $40,000 which Johnson asserts it was offered and refused to take in September, 1938. The money was spent by Tuolumne for certain repairs and corrections which Tuolumne felt was necessary in the dredge.

Thus, no material or genuine issue of fact is raised by any of the affidavits. The basis for summary judgment is that upon admitted or established facts the moving party is entitled to prevail as a matter of law, or that the adversary has no valid claim for relief. When the only real conflict relates to what legal conclusions should be drawn, or whether some rule of law precludes litigation, summary judgment lies. See 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1231.

Johnson reiterates throughout the brief that there is an issue of fact, but we have been unable to find any in the affidavits filed in opposition or in any other part of the record. What this litigation is really concerned with is the legal conclusion to be drawn from the undisputed facts before the Court. Reduction of the case to that question is all that is necessary to give a court power to grant a summary judgment. For that reason it is unnecessary to discuss in detail the many authorities cited by Johnson on the power of a trial court to grant summary judgment. This case meets the tests.

RFC WAS ENTITLED TO SUMMARY JUDGMENT ON JOHNSON'S FIRST CAUSE OF COUNTERCLAIM

In the portion of the Johnson brief devoted to a discussion of its first cause of counterclaim an effort has been made to demonstrate that it has a valid claim for a "first lien." The District Court ruled against Johnson on this claim because the statute of limitations had run, but the ruling of the Court can be upheld on the additional ground, which we are not precluded from showing, that the claim has no validity even when considered "on the merits."

(a) The indenture and chattel mortgage is not a contract for the benefit of a third party.

The essential allegations of the first cause of counterclaim are that RFC and Tuolumne entered into a contract entitled "Indenture and Chattel Mortgage," that Johnson and Tuolumne contracted together in another agreement for the construction of a dredge, that RFC loaned Tuolumne money under the indenture, that Johnson built the dredge but was not paid in full, and that RFC advanced its loan to Tuolumne but did not compel Tuolumne to pay Johnson all that was claimed to be due under the construction contract. Thereafter Johnson obtained a judgment against Tuolumne in actions to which neither RFC nor the trustee under the indenture was a party, which judgment has not been paid.

The Court has the two instruments before it. They plainly show on their faces that Johnson was not a party to the indenture and RFC was not a party to the construction contract. The construction contract provided, however, in Article II that the parties thereto would be bound by the terms of the indenture and chattel mortgage.

The relative time of the events is of some importance. The indenture and chattel mortgage and the construction contract were both executed on May 11, 1937. The Johnson-Tuolumne con-

tract provided, however, that it should not be binding until the first disbursement by RFC under its indenture and chattel mortgage should be received by Tuolumne. (See Article XVI of the contract, Exhibit "D" attached to the Statement of Facts, Tr. 205.) Funds were advanced on June 11, 1937, and the construction contract then became binding for the first time.

The dredge was built during the year following. Delivery of the dredge by Johnson to Tuolumne became final about September 20, 1937, (paragraph VII of the counterclaim), and under the construction contract the final payment was due on the same date. Receipt of the final advancement of funds by RFC to Tuolumne under the indenture occurred on September 24, 1938.

The action by Johnson against Tuolumne in the Superior Court was commenced on March 14, 1939. Judgment was obtained by Johnson in that action on March 1, 1940.

The legal theory of the first counterclaim is that the indenture and chattel mortgage is a third-party beneficiary contract, with Johnson the beneficiary, but the document in question is simply not subject to such a distorted interpretation. It is a complete and unambiguous written document whose meaning can be readily determined within its four corners. It is not subject to variance by parol evidence. Where a written instrument on which a cause of action is founded is pleaded in *haec verba,* construction is controlled by its terms and not by any allegation as to its legal effect. *Faltz v. First Trust and Savings Bank of Pasadena,* 86 C.A. 2d 59, 194 P.2d 135. Where the evidence is a written document, not qualified by testimony, the legal effect of the document is a question of law. *Meyer v. State Board,* 42 A.C.A. 425.

The rule Johnson wishes to invoke is set forth in California Civil Code Section 1559:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The key to the doctrine is in the word "expressly." The cases are legion which hold that a merely incidental beneficiary may not enforce a contract. For example, *Chamberlain v. City of Los Angeles,* 92 C.A. 2d 330, 206 P.2d 661; *Sheppard v. Banner Food Products, Inc.,* 78 C.A. 2d 808, 178 P.2d 455; *Steinberg v. Buchman,* 73 C.A. 2d 605, 167 P.2d 207.

From the agreement itself the District Court and this Court can determine whether the parties to the mortgage expressly intended their agreement to be for Johnson's benefit. Copies are before the Court as Exhibit "A" of both the complaint and the Agreed Statement of Facts. (Tr. 17-69)

This document, about 20 pages in length in the original and 52 pages in the transcript, never once mentions Johnson. It provides a multitude of details safeguarding the rights and remedies of the RFC as the lender of money and limiting the rights of Tuolumne, the borrower. None of these matters can be reasonably construed as other than for the benefit of RFC.

The factual recital in the second paragraph of the first page (Tr. 17) concerning authorization of the loan may be what Johnson conceives to be a promise to him for it mentions a gold dredge, but it also mentions building dams, caring for water level, tailings and overflow water, paying interest on the loan during construction, and, more important, providing working capital. The variety of those items is such that, if Johnson was intended by them to be a beneficiary, so was every other creditor of Tuolumne—a manifest absurdity.

Johnson might be resting its claim on the provisions of Article II, which permitted RFC to certify to the trustee under the indenture that it was necessary or desirable to make payments of specified expenses or obligations. The defects in this interpretation are that the power of RFC is discretionary, not mandatory, and that it is not directed to Johnson's benefit any more than any other possible creditor of Tuolumne in connection with the matter. The

reserved power was for RFC's own benefit; it was not obligatory. It was of a nature similar to the power retained by the municipality in *Crane v. City of Ukiah,* 110 C.A. 2d 640, 243 P.2d 582. The retention of such a power does not make a claimant a beneficiary of the contract.

The purpose of Article II was to provide a constant check on the construction fund. It provided a means for accounting for the money loaned. The veto power of the lender enabled it to make certain that the fund was used in a manner desirable to it in order to protect its security. Nothing required the lender to see that the borrower paid all its creditors. The real intent of the parties is consistent throughout: protection of the lender. Nowhere does it indicate promises for the benefit of any creditor but the RFC.

Johnson can find even less comfort in the other articles. Article I provides for notes payable to RFC. Article III obligates Tuolumne to take proper care of the trust property, to pay expenses of RFC and to protect its interests. Nothing in those articles relates even remotely to an obligation to Johnson. Article IV provides for trust and sinking funds—both to become part of the trust estate and security for the notes of RFC and to provide the means of repayment to RFC—not Johnson or anyone else. Article V defines events of default and provides remedies to RFC as the holder of the notes. Article VI sets forth the duties and powers of the trustee, none of which refer to any creditor but RFC. The sundry provisions of Article VII are also concerned with the protection of the rights of RFC.

Out of this lengthy document, carefully detailed with provisions defining and protecting the rights of RFC, no intent of the parties can be found to enter into promises for the express benefit of Johnson. It is the lender that this document is intended to benefit, not a third party having a contract with the borrower. Nothing indicates an obligation of the lender to require the borrower to

pay someone else before itself, to use the remedies on default for the benefit of another or in any other way to look out for any interest but its own.

The plain terms of the instrument show the purposes of the parties, and references outside the writing are neither necessary nor permissible. The obligations undertaken only to each other, guarding against risks to themselves alone and protecting the interests of themselves alone, make any benefit to a third party purely incidental.

Payment to Johnson is nowhere specified in the indenture. Payment to that company is set forth at length as to amounts, terms and conditions of payment in a separate document to which RFC was not a party and which was not even binding on Johnson until RFC had made its first advance under the indenture and mortgage. It is wholly unreasonable to believe that so important an agreement as to pay a third party over half a million dollars would never be expressed by way of direct promise or covenant.

The relationship of the RFC and Tuolumne and Tuolumne's contractors has been reenacted hundreds of times when lenders have loaned money to borrowers who intended to build buildings and who have given mortgages or deeds of trust covering the real property, including the intended buildings, as security for the loan. Tuolumne intended to build a large chattel rather than a building, but it gave a trust indenture and chattel mortgage covering both its real property and all of its chattels and intangible property, in the same manner as those intending to construct buildings which become a part of the realty. The relationship between the RFC, Tuolumne and its contractors, was the same as in *Smith v. Anglo-California Trust Co.,* 205 Cal. 496, 271 P. 898, where the court found that the fact that the borrower intended to use the loan to construct a building did not make the building contractor a third-party beneficiary of the loan agreement.

The construction of such agreements simply boils down to the indisputable conclusion that the lender and borrower in such a situation have the principal intention of incurring mutual obligations for the benefit of each other, and the fact that someone else may, by virtue of an independent contract with the borrower, be paid out of the loan funds is a mere incident to the principal purpose. In those situations the contractor has no right to recover as a beneficiary under the loan contract. As decided in the *Smith* case, before a third party who may derive a benefit from a promise is entitled to bring an action thereon, there must be an intent *clearly manifested* by the promisor to secure the benefit claimed by the third party. The indenture and chattel mortgage here makes no such clear manifestation of an intent to benefit Johnson and therefore no recovery may be had on the theory of the first cause of counterclaim.

The authorities cited in this part of appellant's brief do not establish its theory. In *Knox v. Kaelber,* 140 N.J. Eq. 474, 55 A.2d 53, there was proof of fraudulent conduct in sale of the mortgaged property for which reason the mortgagee was estopped from asserting a priority, an obviously distinguishing factor. In *Mitchell v. West End Park Co.,* 171 Ga. 878, 156 S.E. 888, a materialman furnished building materials after recordation of a deed as security for a loan and the lien of the lender was held to be prior. The case supports RFC, not Johnson.

In *Northwestern Trust, etc. v. Kessler,* 66 N.D. 737, 268 N.W. 692, a materialman furnished building materials *before* the recordation of the mortgage securing the loan. He could have had a prior lien (something that Johnson could not have had because the indenture and mortgage was recorded first). The lender induced the materialman not to protect himself and was therefore estopped. Similarly, in *Title Guarantee etc. Bk. v. Clifton etc. Bk.,* 149 Va. 168, 140 S.E. 272, one party obtained a beneficial agreement from the other with an understanding of the latter's priority

and then induced it not to enforce the lien promptly. In both cases the complaining party had a valid prior lien to start with. Johnson never had a prior lien and never had a valid lien, except insofar as it may be assignee of the liens of those who protected their mechanics' liens in a timely manner.

Wichita etc. Assn., v. Jones, 155 Kan. 821, 130 P.2d 556, also deals with a factual situation similar to *Smith v. Anglo-California Trust Co., supra.* Mechanics' liens had been perfected and the lender had failed to advance the entire loan. The court said (130 P.2d 559):

> "* * * [O]f course if the loan had been fully paid, but the materialman had not, they would not have been entitled for the appellant would have been fully performed."

(b) Action by a third party beneficiary is barred by the statute of limitations in the same way as action on any other type of contract.

The facts show that on September 24, 1938, RFC made the final disbursement of the sum loaned under the indenture and chattel mortgage dated May 11, 1937. The date of that disbursement is immediately after the date Johnson claimed (and still does) that the dredge was finally delivered and its final payment was due. That date, then, was the date when Johnson could have brought suit.* Johnson delayed, however, until June 22, 1950, nearly twelve years.

It cannot be denied that Johnson was not aware of the breach of contract, if any there were. It brought suit promptly against Tuolumne for the money asserted to be due under the construction contract, the same money which it now asserts is due it as a third-party beneficiary of the indenture and chattel mortgage.

Assuming, *arguendo,* that the mortgage was intended by the

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*It is also the date from which Johnson figures interest. We are unable to reconcile Johnson's claim that the alleged obligation of RFC arose in 1949 with the claim of interest from 1938.

parties to it to be a contract for Johnson's benefit, the right of action is subject to the same disabilities due to passage of time as the right of any other promisee under any other contract.

Johnson had to commence his action on the written contract within six years after his rights accrued, under Title 28 U.S.C. Section 2401(a).* The fact that Johnson pursued an action against Tuolumne is immaterial, for, if Johnson had a right against RFC, it was not conditioned upon exhausting a remedy against Tuolumne. A third party beneficiary is entitled to maintain his own action directly against the promisee and is barred if the action is not commenced within the period allowed by law. *Bogert v. George K. Porter Co.,* 193 Cal. 197, 61 P. 1107; *Pitzer v. Wedel,* 73 C.A.2d 86, 165 P.2d 971.

Johnson does not argue only that the statute of limitations has not run. It repeatedly and vigorously asserts that the RFC "waived and was estopped to assert" the defense. That argument will be discussed later. The facts do not support it. There has been no showing that anyone having legal authority acted for the government in such a way as to result in either waiver or estoppel.

Johnson claims that the statute of limitations is inapplicable. This claim is based upon a misconstruction of *Holmberg v. Armbrecht,* 327 U.S. 392. In that case there was not the simple distinction between the enforcement of legal and equitable rights that Johnson suggests. The equitable doctrine of laches was applied rather than the rule of the statute of limitations because the right sought to be enforced arose not from state law but from section 16 of the Federal Farm Loan Act. Since the action was

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*"§ 2401. *Time for commencing action against United States* (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

brought in the federal court on a claim arising from federal law the state statute of limitations had no application. There was no applicable federal statute of limitations. Therefore the only possible defense based upon the passage of time was the doctrine of laches.

The court said at page 395 that if Congress explicitly put a limit upon the time for enforcing a right which it created that would be the end of the matter. The Congressional statute of limitations would be definitive. Such is the case before the Court.

Johnson does not sue, as did the plaintiffs in the *Holmberg* case, upon a federally created right, the sole remedy for which lay in equity. Stripped to its essentials, Johnson is simply suing on an action at law as a third party beneficiary of a contract. Everything else it complains of is merely secondary and remedial. The case is not similar to the *Holmberg* case, but to *Guaranty Trust Co. v. York,* 326 U.S. 99, which was distinguished and not overruled by the *Holmberg* case. Johnson sues on a state-created right for which the remedy is at law, which remedy is subject to a federally-created statute of limitations. Johnson relies throughout on state law in determining the origin and nature of its claims, and the District Court did likewise. There is no body of substantive federal law governing the claims, but the remedy in the Federal Court is governed by the federal statute of limitations. It is procedural and was properly relied on by the District Court. Unlike the *Holmberg* case, where Congress left the formulation of remedial details to the courts, in this case Congress has enacted an applicable statute of limitations.

RFC WAS ENTITLED TO SUMMARY JUDGMENT ON JOHNSON'S SECOND CAUSE OF COUNTERCLAIM.

The District Court found that any lien Johnson may have had was waived and, if there had been a lien, it would be barred

by the statute of limitations. A lien is merely accessory to a personal obligation and is barred by the same statute of limitations as the obligation itself. We rely on the authority cited by the District Court.

(a) There is no basis for an equitable lien.

In Johnson's second cause of counterclaim it is alleged that it is entitled to a lien superior and senior to any lien of the plaintiff against the property of Tuolumne. The evidence before the Court conclusively shows that, if Johnson had any lien at all, it was junior and subordinate to the lien of the RFC, which was created by the original indenture and chattel mortgage. The priority of the RFC lien is demonstrable on several grounds. In addition, while the Johnson lien, if any, was becoming barred by the statute of limitations, the RFC lien was kept alive by timely re-recordation.

Under California Civil Code Section 2881 a lien is created by contract of the parties or by operation of law. The evidence negatives a contractual lien existing in Johnson's favor, so a lien must arise by operation of law, if at all.

The appellant has difficulty in classifying its purported lien and therefore states: "It is predicated upon equitable rules of estoppel, upon the maxim that he who seeks equity must do equity, upon the doctrine of unjust enrichment and upon elemental principles of equity and good conscience." (Brief, p. 37)

From this description it can be determined that the alleged lien is neither statutory nor common law in origin and is none of the known legal liens. It is only an equitable remedy that appellant desires to have imposed. Appellant overlooks the fact that an equitable remedy is available only to protect some pre-existent right (either to obtain money damages or to subject property to a charge). The remedy of an equitable lien is a procedural creature of a court of equity, but the right upon which it is

predicated is not. An equitable lien, like a constructive trust, is a remedial measure to protect a right which existed independently of and prior to any decree of court and which could be protected effectively only by the imposition of a lien or trust by a decree of court. The right must relate, as a charge, to some specific property and the court can charge only that property with an equitable lien. See Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 1, §§ 165-167, and Scott on Trusts, Vol. 3, § 463.

Johnson must show that it has a right to charge the former property of Tuolumne and that the right can be protected effectively only by the imposition of an equitable lien. Otherwise summary judgment on the second cause of counterclaim was entirely proper.

Appellant finds no possibility on which to base its claim for a lien except in the financing arrangements by the RFC and Tuolumne, which provided for a construction fund to be used for the purchase of a dredge and for other purposes, including use as working capital. Any claim of lien was limited to that particular fund. It was the only property which Johnson's construction contract related to, against which its claim for payment could have been a charge.

Reliance is placed on *Wichita, etc. v. Jones, supra,* which is consistent with the California cases. The court did not recognize any right in the building contractor except in relation to the *building fund* which the lender was required to furnish, *whether the builder received it or not.* The court did not purport to establish a rule that the lender was obligated to see that the builder received his money from the loan fund. All the lender had to do was furnish the money to the borrower.

The law of California on the subject also clearly excludes the present case from the equitable lien theory. The remedy of an equitable lien will be imposed under California law only on a construction fund. If a lender has withheld money which it agreed

to advance to such fund, the court will require the lender to advance the amount of the loan, but no more. RFC has already done that and the money has been expended by Tuolumne. There has been nothing left in the construction fund upon which to impose an equitable lien for 10 years before Johnson filed its counterclaim.

The applicable principles of law are to be found in *Smith v. Anglo American California Trust Co.,* supra; *Pacific Ready Cut Homes v. Title Ins. & Trust Co.,* 216 C. 447, 14 P.2d 510; *City Lumber Co. v. Park,* 14 C.A. 2d 431, 58 P.2d 403; and *Crescent Lumber Co. Inc. v. Borchers*, 59 C.A. 2d 318, 138 P.2d 779.

In no instance has a court required a lender to see to it that a borrower pays the contractor. The third party beneficiary theory has been specifically rejected in the *Smith* case. Without such an interpretation of the loan agreement there is no basis for such a duty. All that the lender need do is furnish the money to the borrower, which has been done. No court has required that the lender furnish more than the loan contracted for.

In the *Smith* case insolvency of the borrower occurred before the last portion of the loan funds had been disbursed by the borrower from the building loan account which the lender had established for it. The borrower's administrator attempted to recover the amount of the loan not paid out. The lender then did the logical thing and sought to retain the remaining $4,000 of the loan, asserting a right to apply it against the principal debt. The builders claimed liens against the real property. Those liens were junior to the encumbrance of the lender because work was commenced after recordation of its encumbrance. The builders also asserted a lien against the $4,000, the unexpended portion of the building loan account or construction fund.

The court found that the debt owed to the lender was secured by a lien on the property prior to any lien of the builders and that the lender's obligation to advance the total amount of the loan still existed despite the insolvency of the borrower. The remaining

funds in the construction fund held by the lender could not be withheld from the borrower, who would in turn be obliged to use them for payment to the builders. Under the circumstances, the funds still in the construction fund were subjected to an equitable lien in favor of the builders. *No other property was subject to a lien and the prior lien of the lender on the property of the borrower was protected.*

The justification for the holding was that the lender had a duty to advance the full loan and would be unjustly enriched if it did not do so; the builders had fulfilled their obligations to the borrower and had filed timely lien claims; and the lender had its prior lien upon the property of the borrower, as improved by the builders, upon which it had relied in making the loan agreement. The borrower, although insolvent, received performance of the loan agreement, subject, however, to the charge of the builders against the remainder of the building fund. As mentioned above, the Court specifically rejected the theory that the builders were third party beneficiaries of the loan agreement.

The *Pacific Ready Cut Homes* case was decided upon precisely the same theory.

The material differences of the present case are readily apparent. Here the loan was not withheld from the borrower. It was advanced in the required time and manner to the construction fund. The loan or construction fund, the only item which could be subjected to an equitable lien under the *Smith* case, was advanced to Tuolumne in accordance with the terms of the indenture and chattel mortgage, the last portion thereof on or about September 24, 1938. There is no existing balance of the loan yet unadvanced to which an equitable lien can apply. It was expended by Tuolumne about 10 years before Johnson filed its counterclaim.

The *Smith* and *Pacific Ready Cut Homes* cases do not stand for the proposition that a prior lien can be imposed on the property itself, which is what Johnson is attempting to establish here.

Neither are they authority for so-called tracing. Neither do they stand for the proposition that the lender must advance any amount over and above the agreed loan in order to pay off a builder to whom the borrower still owes money, yet that is the inevitable result of the claims of Johnson in this case.

Even on the equitable lien theory Johnson's claim is limited to that of a subrogee or assignee under the doctrine established by the *Smith* case. The court did not permit equitable liens in favor of anyone who had failed, as Johnson did, to meet the statutory requirements for a legal lien by timely filing of a claim for a mechanic's lien.

In *City Lumber Co. v. Park*, supra, it is emphasized that in all the equitable lien cases such liens were enforced in favor of holders of mechanic's liens who had taken the necessary statutory steps to perfect such liens. It is also pointed out that the whole line of cases stemming from the *Smith* case involved actions to subject the *unexpended balance of a building loan* to an equitable lien in favor of the holders of mechanic's liens which had become worthless due to the amount of prior encumbrances. Where the construction fund has been entirely expended, there is nothing to which an equitable lien can attach.

In a case where the unexpended portion of such fund was paid, after the completion of a building, to one of several lien claimants, action was brought by one such claimant against another who received the money, in an attempt to have an equitable lien impressed on the funds. The court held that there was no theory upon which the plaintiff was entitled to relief. *Crescent Lumber Co., Inc. v. Borchers*, supra. No existing balance of unexpended fund was in existence upon which equity might have imposed the lien and *tracing was not allowed*. Although one lien claimant received the entire balance of the loan fund in existence at the time of completion of the building, paying off his claim almost in its entirety, and the plaintiff received nothing, the court found there

was no unjust enrichment. The case presented to the court was even stronger than Johnson's claim for Johnson seeks to compel the *lender* to repeat part of the loan.

The plaintiff in the *Crescent Lumber* case relied on the *Smith* case, but the court said (59 C.A. 2d at 321):

> "From what has already been said, it is apparent that the facts in the case are clearly distinguishable. Furthermore, as pointed out in a more recent case, the Smith case and similar cases are based upon the proposition that an equitable lien should be imposed under certain circumstances to prevent 'unjust enrichment' of one of the parties to the litigation; and it is said that when there is no unjust enrichment, 'The rule as to equitable liens should not be enlarged and extended * * *' (*Mortgage Guar. Co. v. Hammond Lumber Co.*, 13 Cal. App. 2d 538, 544 [57 P.2d 164.].) There is no element of unjust enrichment appearing here and there is no existing balance in any unexpended fund upon which equity may impose a lien. The trial court, in attempting to apply the equitable lien theory of the *Smith* case, entered an ordinary money judgment against all defendants, including the title company, but we find no theory under the agreed facts upon which plaintiff could be entitled to any relief against any of the defendants."

To sum up the equitable lien theory, it can be said that it is limited to those rare situations where persons who have complied with the requirements for statutory mechanic's liens have brought timely actions to enforce equitable liens against the balance retained in construction funds and not expended prior to the commencement of the action. In those cases the balance of unexpended loan funds only, and not the property itself, may be subjected to a lien, where not to do so will result in unjust enrichment. To state the proposition is to exclude Johnson's claim. There is neither an unexpended loan fund nor unjust enrichment in this case.

The real result sought by Johnson is either to have a lien impressed upon the dredge or the real property itself, not on the un-

expended loan fund, in a manner unauthorized by statute or judicial authority, or else to subject RFC to damages in a manner equally without legal authority.

Appellant argues that it was induced to forego any lien on the dredge. In reality Johnson gave up nothing, so far as the priority of the RFC loan was concerned. Johnson could not have acquired a prior lien under any interpretation of the facts. The lien of a trust deed, mortgage or other encumbrance recorded prior to the commencement of the work on an improvement is a superior lien unless the seniority is specifically waived by the lienee. See *Barr Lumber Co. v. Shaffer,* 108 C.A. 2d 14, 238 P. 99; *San Pedro Lumber Co. v. Wilson,* 4 C.A. 2d 41, 40 P.2d 645. The facts are clear in this case that Johnson has no claim to priority. Recordation of the RFC indenture and chattel mortgage occurred on June 2, 1937. (Tr. 179) Work commenced in about December, 1937. (Tr. 328)

If Johnson is the subrogee of legitimate lien claimants who complied with the statutory requirements, the lien or liens it claims as subrogee are inferior to that of RFC due to the rule that a mechanic's lien is junior to a prior trust deed when neither the trustee nor the beneficiary under the trust deed is joined in the foreclosure action within the period required by California Code of Civil Procedure 1181 et seq. This would be true even if the mechanic's lien would have been senior, but for the failure to join the beneficiary or trustee. In other words, the period of limitations contained in the mechanic's lien statute (C.C.P. 1181 et seq.) is a statute of limitations barring mechanic's liens in respect to the rights of parties not joined in the foreclosure action in a timely manner. *Paramount Securities Co. v. Daze,* 128 C.A. 515. When this rule and that of the *Smith* case are considered together, it becomes clear that Johnson's purported equitable lien by subrogation is junior to the RFC lien because of the failure to join RFC in the suit against Tuolumne. The *Smith* case makes an equitable

lien dependent upon a mechanic's lien and the *Paramount* case holds that such a lien may be established only by joining other parties after compliance with the statute.

Even aside from the provision in the construction contract, under which Johnson agreed to be bound by the indenture and mortgage including its provision establishing a first and prior lien in favor of RFC, Johnson could not have acquired a *prior* lien. The only lien on the Tuolumne property it could have gotten would have been a mechanic's lien, junior to the RFC lien. It was not induced to forego such a lien on the dredge, for it would have been entitled to a mechanic's lien by operation of law had it gone to the trouble required to file a notice of claim of lien as its subcontractors did. The best that Johnson can claim now is that it is the subrogee of junior mechanic's liens acquired by its subcontractors. It is stated in Mr. Johnson's affidavit (Tr. 216-17) that "the lien claimants have been fully paid and Johnson Company is now subrogated to all of their rights under the judgment." We must assume from that that the mechanic's liens of the subcontractors, which became merged in their judgments against Tuolumne and became judgment liens, have been acquired by Johnson. Whether the liens date from the judgment or from the date the original notices of claims of lien were filed, the liens are subsequent in time and subsequent in priority to the lien of the RFC. Those liens were wiped out by the judgment entered on the RFC complaint, from which Johnson has not appealed, and no claim could possibly be based on them at this time.

Cases cited by Johnson do not detract from the analysis made herein. In *Theatre Realty Co. v. Aronberg Fried Co. Inc.*, 85 F.2d 383 (C.A. 8, 1936) the court imposed an equitable lien on the unexpended balance of the loan fund only, not on the debtor's property. Similarly in *San Mateo P. M. Co. v. Davenport R. Co.*, 218 C. 702, the builder was allowed to recover only against the loan fund and no recovery was allowed in excess of that fund after

it was exhausted. The acceptance by the lender of certain orders, with a guarantee of payment, was tantamount to a novation.

In *Whiting-Mead Co. v. West Coast B. & M. Co.,* 66 C.A. 2d 460, 152 P.2d 629, the court held that the unexpended balance of a construction fund should be paid pro rata to mechanics and materialmen, to the exclusion of general creditors. The case differs from the *Smith* decision only in that the court did not make valid liens a prerequisite for participation. The case does not hold that a lender undertakes an obligation to see that the builders are paid. The *Wichita etc. Assn.* case has already been discussed.

Johnson has cited some cases which establish that equitable liens are within the remedial powers of a court. This is undeniable. Johnson misses the fundamental premise, however. Equitable liens are merely remedial devices. There must be a preexistent right in or to or against certain property, which right has been pursued in a timely manner before the remedy will be used by a court. Johnson is unable to show such a right. One of the cases it cites, *Security Fed. S. & L. Assn. v. Undersood C. & S. Co.,* 245 Ala. 56, 16 So. 2d 100, holds that a lender has no implied obligation to see that the borrower uses the loan fund to pay mechanics and materialmen.

In *Anderson Inv. Co. v. Jones,* 104 Wash. 142, 176 P. 17, lien claimants were entitled to priority over a second mortgage only because the lender had failed to advance all the loan. The case is not authoritative here for RFC did advance all of its loan.

Johnson speaks of transfer of the construction fund by RFC to third parties. The agreed facts are that RFC advanced the funds to Tuolumne. Tuolumne then used them, as it was entitled to do, for working capital. There was no guaranty or suretyship by RFC, as the indenture and mortgage plainly show. Cases relating to such relationships are irrelevant.

Other cases cited on the general theory need not be discussed. They do not vary the principles which we have shown exclude Johnson's claim.

Certain cases on unjust enrichment are also cited. Without exception the cases involve the obligation of a person directly benefited by retention of another's property to make payment for it. Where a benefit has been bestowed in connection with particular property, equity has imposed a lien upon that property, but it does not impose an obligation upon a third party who is only incidentally benefited. The contracts of RFC and Tuolumne and of Tuolumne and Johnson were mutually exclusive and left no room for the implication of any obligation of RFC to Johnson. Finally, restitution is required only where the person sought to be charged received property belonging to the claimant. The only property in which Johnson might have had an interest was the construction fund. RFC did not receive it and Tuolumne paid other creditors with it in using it as working capital. RFC received nothing in which Johnson had a beneficial interest, which a court can require RFC to restore.

(b) Johnson is barred by lapse of time.

Johnson's claims are so nebulous that assumptions of several possibilities have been made in order to dispose of them, but, whatever the type of lien depended on, the obligation to which it is accessory is barred and therefore the lien itself is barred. Johnson could have had a junior lien as the subrogee of the mechanic's lien claimants but a junior lien is of no value. Johnson must show a senior lien or it has nothing. In order to achieve this it has claimed a redemial lien upon the basis of certain ponderous maxims.

We have shown that the type of lien claimed does not result from the operation of these maxims but depends on factual situations, into the pattern of which Johnson cannot bring itself. Nevertheless, if we assume for the purpose of argument that Johnson has a legitimate claim to a lien, action to enforce the obligation to which the lien is accessory was brought too late.

Whether the alleged lien be legal or equitable, it is merely

> "* * * accessory to the act, for the performance of which it is security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation." California Civil Code Section 2909.
>
> "A lien is extinguished by the lapse of time within which, under provisions of the Code of Civil Procedure * * * an action can be brought upon the principal obligation * * *." California Civil Code Section 2911.

The next logical inquiry is the determination of the act to which the alleged lien is accessory. If the basis upon which Johnson asserts the lien is an obligation of Tuolumne, it impliedly admits that Johnson's alleged lien is not accessory to an obligation of RFC.

If the loan is accessory to an act performable by RFC to Johnson, then that act must be identified and the date of its non-performance ascertained. There has been no attempt by Johnson in the affidavits in opposition to the motions for summary judgment to show fraud on the part of RFC.

The actual expenditure of the funds complied with the requirements of the indenture. RFC did not retain any of the loan funds, but advanced them as required by its agreement to Tuolumne, which in turn had the power to use them for any of the purposes permissible under the original loan agreement.

Even if some obligation was owed directly to Johnson by RFC, to which a lien could be accessory, the property to which it would attach must be specified. There are no loan funds in RFC's possession and there are none in Tuolumne's possession. The only possibility is the property of Tuolumne, where Johnson's lien would be a secondary charge. No theory of law has yet been developed which would allow a lien in favor of Johnson to hurdle the RFC lien on that property and assume first priority.

If there were an obligation on the part of RFC to compel Tuolumne to pay Johnson the final advancement, or, failing that, for

RFC to make such payment itself, Johnson's claims are still faced with the defenses of the statute of limitations and laches. If the RFC had either a legal or equitable duty to pay Johnson itself or to compel Tuolumne to pay Johnson, the duty was breached in September, 1938, almost 12 years before the filing of Johnson's action against it. If RFC's duty were a legal duty, it is barred by the statute of limitations. Even if the statute were inapplicable, action by Johnson is barred by laches. The period of time during which an action might have been brought is almost twice that allowed by the statute of limitations. The period of the statute of limitations is customarily adopted by courts of equity and is a sufficient bar here. We need not quibble about the terminology.

This Court has decided that the statute of limitations applies to *every civil action* against the government and excludes only criminal and admiralty proceedings. See *Werner v. U. S.,* 188 F.2d 266, 268 (C.A. 9, 1951). Since the principal obligation, whatever it may have been, is barred, any lien accessory to it is extinguished.

Where a principal obligation is barred by the statute of limitations, equity cannot declare and enforce an equitable lien. *Beal v. United Properties Co.,* 46 C.A. 287, 298, 189 P. 346.

Johnson's nebulous claims can certainly not place it in any stronger position than a party holding a deed of trust. In a controversy between one holding a second deed of trust and one holding a first deed of trust, the holder of the second deed of trust has a right to plead the statute of limitations as against the notes secured by the first deed of trust. *Flack v. Boland,* 11 C.2d 103, 77 P.2d 1090. The statute not only bars the action on the debt but also deprives the mortgagee of the right to enforce the lien of his mortgage, under California Civil Code Section 2911. Therefore, even if Johnson had a lien, the statute of limitations prevents the enforcement of it.

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S THIRD CAUSE OF COUNTERCLAIM

Johnson's third cause of counterclaim is based upon the same facts as the first two, but the theory is changed somewhat, it being alleged here that the RFC has been unjustly enriched in the amounts claimed to be due Johnson in that the RFC received the proceeds of the operation of the dredge by Tuolumne. It is also alleged that plaintiff received such amounts as trustee for the benefit of Johnson.

The facts show that the RFC did receive amounts from Tuolumne from its income in operating the dredge. Those funds were paid to RFC in exactly the manner required by the original indenture and chattel mortgage. The source of the funds—profits of Tuolumne operations—was that contemplated for repayment of the RFC loans. The funds were not, as in the *Smith* and *Pacific Ready Cut Homes* cases, the original loan funds which the lender was trying to retrieve before the borrower had expended them to the contractors. Amounts paid to the RFC from Tuolumne's income went through the trust fund under the indenture according to the plan well known to Johnson before it entered into contract with Tuolumne. Johnson seems to overlook the fact that it knew from the outset that the indenture and mortgage contemplated a self-liquidating project, i.e., that the loan was to be paid from earnings.

The first topic heading in Part IV of appellant's brief states a proposition which is obviously distinguishable from the present case. It is true that an unpaid contractor who has relied on a construction loan for payment may have an equitable lien on the fund, but when the fund is gone there is nothing against which the lien can be a charge. Appellant further asserts that a lender who diverts part of the fund to other uses than the payment to the contractor is to that extent liable to the contractor personally. The latter assertion is constantly reiterated, but we are unable to find any basis for

an obligation on the part of RFC to compel Tuolumne to pay Johnson. Neither legal authority nor the facts support it.

We mention in passing that in its discussion of this part of the counterclaim Johnson reiterates the fallacious argument that the District Court erroneously decided against it "on the merits," as though that action were beyond the Court's power under Rule 56. The *Suckow Borax* case disposes of this contention.

The argument in favor of the third cause of counterclaim is founded upon a basic misconception, i.e., that the construction fund and the earnings of the dredge (trust fund) were the same. The fallacy of the assumption is demonstrable by the simple expedient of reading the indenture and chattel mortgage. Two funds are provided for in that document. The first, the construction fund, was created from the RFC loan. (Article II, Tr. 38-9) It had various uses including, but not limited to, payment for the dredge and use as working capital. If Johnson had any claim of a lien or charge, the *construction fund* was the only property against which such lien or charge could exist.

A second fund, known as the trust fund, was created from the earnings of the dredge. (Article IV, Tr. 47-9) Its main purpose was to provide funds for the sinking fund (Tr. 49-50) which was to be used for payment of principal and interest due RFC. In addition the trust fund was also usable as working capital. Johnson had no special claim of any kind on the trust fund. It was simply a general creditor. No authority has been found which would permit a court to give an unpaid contractor any special right in the trust fund. In all of the cases cited in the Johnson brief and all of those which have come to the attention of counsel for the RFC, in which contractors have been given equitable liens or special rights, such liens or rights have been limited in every case to the unexpended balance of the construction or loan fund. In some instances lenders have been compelled to perform in full the loan agreement, where the loan has not been entirely advanced, but no

lender has been compelled to furnish additional sums and in no case have the earnings of the borrower been subjected to a lien.

Once the construction fund and the trust fund are distinguished Johnson has nothing left to argue about. Its argument is compounded from the confusion of the two funds. Johnson first erroneously assumes that the construction fund was dedicated to it alone and that RFC had undertaken an obligation to it, as a third party beneficiary, to see that the money was used in no other way. We have already disposed of that contention. Johnson next assumes that a special interest in the nature of an equitable lien, which it may have had against the construction fund, can be transferred to other property such as the earnings of the dredge. Neither the terms of the indenture nor any principle of law permits this.

Assuming Johnson had an equitable lien, it was a charge against the construction fund only. Once the fund was gone, the charge against it was gone also. Johnson might have protected its lien had it pursued proper remedies in a timely manner. It would have been a simple matter in its action against Tuolumne in the state court to use some ancillary process, such as a restraining order, an attachment or a receivership to maintain the construction fund intact. It neglected to do so, leaving Tuolumne free to use the construction fund as working capital. Johnson was aware of such use not later than January, 1943. (Tr. 154) It knew of the work on the dredge by another company in 1939. (Tr. 412-13) Despite that knowledge Johnson took no action and Tuolumne expended the fund in the course of its operations. Johnson became only a general creditor. In the present action Johnson seeks to have the Court remedy its error in judgment of 10 or 15 years ago.

(a) RFC received no money or property to which Johnson was entitled, so no unjust enrichment resulted.

Unjust enrichment is a phrase of little meaning unless it be connected to a situation in which benefits, to which the claimant

would have been entitled, are conferred by mistake, fraud, coercion or request upon the benefited party.* The facts here plainly show that no benefit was conferred by Johnson upon RFC under any of those circumstances. Payment of RFC by Tuolumne of amounts out of its income was not a conferring of a benefit to which Johnson was entitled for the simple reason that it was not Johnson's money which was paid to the RFC. Neither was it money from the construction fund. Tuolumne paid its own money, as it was entitled to do and as it was required to do under the indenture. Unless the money paid by Tuolumne was Johnson's money, RFC could not have received anything belonging to Johnson.

A constructive trust may be imposed only to prevent unjust enrichment where one person wrongly acquires property of another. Where there is no unjust deprivation of the claimant and no corresponding unjust retention of the claimant's property by the other party, no constructive trust may be imposed. A constructive trust is simply a remedy provided by a court of equity where those special circumstances appear. The assertion in Johnson's pleading that RFC received funds as trustee for the benefit of Johnson simply states Johnson's legal conclusion that the court ought to invoke such a remedy. There is obviously no express trust involved in this matter.

Unless some property of Johnson's was held by Tuolumne and by it delivered to RFC, Johnson is merely a creditor of Tuolumne. And no constructive trust may be imposed for the benefit of an ordinary creditor. Johnson must show, and the facts demonstrate that it cannot show, that it owned a beneficial interest in the income or other property of Tuolumne.

If Johnson has a remedy at law against either Tuolumne or RFC, no constructive trust could be imposed, for equity will not act in that

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*[Involuntary trust resulting from fraud, mistake, etc.] One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." California Civil Code § 2224.

manner if an adequate legal remedy exists. The adequacy of a legal remedy is to be measured in each case by the rights of the claimant and not by the possibilities of recovery. A constructive trust will not be imposed merely because, owing to the insolvency of the debtor, the recovery at law will be inadequate. The uncollectibility of Johnson's judgment against Tuolumne furnishes no reason for equity to create a constructive trust.

Johnson's theory in the third cause of counterclaim has to be based upon the premise that it had a beneficial interest in the property of Tuolumne. We have shown that there is no basis for an interest by way of a contractual promise or a lien on Tuolumne's property generally. However, assuming at this point that Johnson had brought a timely action to enforce an equitable lien, such a lien would be limited to the unexpended portion of the loan funds. It is impossible to impose one now, for there is no such unexpended portion in existence. It was used by Tuolumne in the payment of other debts than that of RFC ten years or more before Johnson's present action.

The theory relied on here is apparently that of *Whiting-Mead Company v. West Coast Bond and Mortgage Company,* supra. The case represents an extension of the law stemming from *Smith v. Anglo Bank,* but on a different theory—that of a trust. By adopting the trust theory rather than the equitable lien theory in that case the Court was enabled to permit recovery of all claimants, whether or not they had perfected legal liens in the manner required by state statutes and the *Smith* case. By imposing a trust all the unpaid mechanics and materialmen were placed in the same category and shared pro rata. The important point of the decision, in its application here, is that the trust was imposed upon the *unexpended loan fund* and nothing else.

The case is no authority for imposing a trust in the present case for two reasons. First, there is no unexpended portion of the construction fund to become the trust *res.* Second, the peculiar under-

taking of the lender in the *Whiting-Mead Company* case is not matched by the indenture and chattel mortgage here. RFC did not undertake to make certain that payments from the construction fund went to contractors, but merely reserved a veto power enabling it to maintain an accounting check on the fund and to protect its own security. The power of the RFC was similar to that reserved in *Crane v. City of Ukiah,* supra, for its own benefit and not that of the third party. Also, the purpose of the loan was nowhere expressly limited to the purchase of a gold dredge. "Working capital" was one of the purposes. That is a broad phrase allowing any expense reasonably connected with the Tuolumne operation.

All that was required of RFC was payment into the construction fund. Once that occurred (September 24, 1938) there was no property of Tuolumne in the hands of RFC upon which a constructive trust could be imposed.

There is still another answer to this claim of unjust enrichment. If there were any enrichment of RFC, it could hardly be unjust as to the amounts advanced by RFC before Johnson's asserted lien arose. In other words, the first lien of RFC could, under the most extreme extension of Johnson's theories, only be reduced by the amount due Johnson under the construction contract (about $33,000) and RFC still would have a prior lien for the $567,000 first advanced, plus any other mandatory expenses or advances. Johnson then would be in line for a secondary lien for $33,000, which would be followed by a further lien in favor of RFC for such $33,000 together with any optional or additional expenses or advances which were made later. There is no authority for allowing Johnson to hurdle the prior lien of RFC for the first $567,000 advanced. Even if there were any reasons for the arbitarary advancement of Johnson's place in the succession of liens, such an advancement is precluded by the specific agreement of Johnson in its contract with Tuolumne to be bound by the original indenture and chattel mortgage which granted RFC a prior lien. The

agreement between Johnson and Tuolumne recognizing and preserving the preferred position of the RFC was in effect a contract for the benefit of RFC.

The cases cited by Johnson agree with the general principle that constructive trusts are implied by law to prevent fraud. See *Johnson v. Clark,* 7 C.2d 529, 533 and 535. They also agree that the claimant must have had a beneficial interest in the particular property subjected to the constructive trust. Johnson has shown an inability to create an issue of fact either as to fraud or as to the existence of a beneficial interest in any property of Tuolumne. A constructive trust is imposed only for the benefit of the rightful owner of property, not for a general creditor who once had a special claim against property no longer in existence and who failed to protect itself in a timely and appropriate manner.

(b) Johnson's claim on theory of unjust enrichment is barred.

Finally, Johnson's claim against RFC, which it desires the court to protect by the use of equitable relief, is barred by the statute of limitations. Even if the primary obligation were of such nature that the statute of limitations were inapplicable, the lapse of time is still a complete defense. The statute of limitations will be applied by analogy by a court of equity. Laches, apparent herein as a matter of law, serves as a defense to this cause of counterclaim. In the case of a constructive trust the statute of limitations commences to run with the inception of the trust, i.e., the unlawful transfer by the trustee. *Easton v. Geller,* 116 C.A. 577, 3 P.2d 74; *Siem v. Hjelm,* 49 C.A. 2d 148, 121 P.2d 87; *Bell v. Bayly Bros.,* 53 C.A. 2d 149, 127 P.2d 662. If there were such an unlawful transfer, it occurred between 1938 and 1943, at least seven or eight years before the counterclaim was filed. Johnson had notice of it in 1939, when another company rebuilt the dredge, and prior to January, 1943, when it made one of its periodic proposals to RFC. (Tr. 154)

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S FOURTH CAUSE OF COUNTERCLAIM

The facts show that in the period from July, 1940, to September, 1942, Tuolumne paid RFC $120,000 principal and $9,948.49 interest, pursuant to the second indenture and chattel mortgage, which had been executed on November 29, 1939. (Statement of Facts, Section 9) RFC accepted the payments and applied them in satisfaction of the debt secured by the second indenture. Johnson charges that those facts, particularly the acceptance of funds by RFC while it had knowledge of Johnson's claims, was in "fraud" of its "rights." Johnson demands a constructive trust as its remedy.

In its brief Johnson asserts that the *fraud* was "constructive." Whether the fraud is called intentional or constructive the result is the same. The District Court could find absolutely nothing in the record raising an issue of fact concerning this charge.

A constructive trust is a remedy which is imposed when the constructive trustee has acquired property to which another party is entitled. The claimant must have an interest in the specific property, however, before the remedy can be invoked. Unlike a lien, a mere charge upon property, a constructive trust is predicated upon a beneficial interest in the property. It is imposed for a rightful owner, not a general creditor. The facts in this case do not permit of the findings necessary to support the remedy and no genuine issue of fact has been raised.

Johnson ignores the facts in asserting that RFC took property in which Johnson had an interest. The only property which RFC received was from the Tuolumne sinking fund, which had come from the trust fund, which had come from the earnings of the dredge. Johnson was never more than a general creditor in regard to any of those funds.

Johnson distorts the facts in claiming that RFC used the construction fund for other purposes than payment to Johnson and

then took the earnings of the dredge for itself. The true relationship between Johnson, Tuolumne and RFC can be ascertained from the agreements between the respective parties. Johnson's argumentative interpretation of the facts cannot change the legal import of the agreements. The earnings of the dredge were Tuolumne's property, but it had an obligation to transfer them to the trust fund and then the sinking fund. Johnson had no right, title or interest in the earnings of the dredge. Nothing in the agreement gave it any right to the earnings. If it gained such a right by some other means it should have made a showing to that effect in opposition to the motion for summary judgment. It could gain no such right from the mere fact of being a creditor. In the absence of such a showing the District Court was entitled to find the facts from the documents it had before it.

Johnson asserts there was a confidential relationship between it and the RFC. This assertion is so absurd that we take no more time to refute it. The assertion would be entitled to consideration only if Johnson had made some showing that it could raise a serious issue of actual fraud.

Johnson next suggests the notion that the RFC held the construction fund in trust, but the theory of the case relied on (*Whiting-Mead Co. v. West Coast, etc.* supra) does not apply to the facts of this case. The remedial device of a constructive trust of the construction fund could be used only against an unexpended balance. Tuolumne used the fund as working capital in the operation of its business, exhausting the only property upon which a constructive trust could be imposed, and there is nothing in which Johnson had any interest to impose a trust on now.

(a) A debtor may prefer one creditor over another.

Assuming that Johnson had the rights it claims, including a lien, there was no obligation on Tuolumne to pay creditor Johnson before creditor RFC. Tuolumne owed money to many people, but

was not insolvent or bankrupt. Therefore, it could pay its creditors in any order it chose. If any was dissatisfied, he had adequate remedies. Johnson could have used remedies such as receivership, attachment, injunction or, after it had a judgment, execution. If it had any rights against RFC, it could have brought an action in a timely manner. The mere fact that a debtor pays a junior encumbrancer, if that was the status of RFC, before it pays a senior lienholder, does not show fraud. More than the order of payment must be shown, yet nothing else is alleged by Johnson.

Under California statutes, particularly Civil Code Section 3432,* a debtor may prefer one creditor over another by conveyance of property, even if insolvency results and other creditors suffer. *U. S. v. Eleven Certain Parcels of Land,* 45 Fed. Supp. 289, 390. The fact that the preference hinders or delays other creditors in the collection of their claims does not render a preference void, nor does the fact that the preferred creditor had knowledge that such consequence would follow the preference. *U.S. Fid. & Guar. Co. v. Postel,* 64 C.A. 2d 567, 672, 149 P.2d 183; *Millard v. Epsteen,* 58 C.A. 2d 612, 137 P.2d 717.

The charging allegations of the fourth counterclaim actually claim fraud only in relation to the payment received by RFC and applied on the debt secured by the *second* mortgage. It does not relate to payment applied to the first mortgage. The amount applied to the second was obviously not the entire amount of the proceeds of the operation of the dredge, being less than $130,000, including both principal and interest; all of the remainder received by RFC was applied to the debt secured by the first mortgage and other expenses and advances and interest. Nineteen of the notes under the first mortgage were thus paid off. The limited

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*"3432. *Payments in preference.* A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

charge of fraud then necessarily refers to the period between July, 1940, and September, 1942, when payments relating to the second indenture and chattel mortgage were made.

Johnson was simply a creditor whom Tuolumne opposed with claims at least as great. All the claims were the subject of a pending lawsuit when the second RFC mortgage was paid off. Johnson's lawsuit against Tuolumne was equated by that of Tuolumne against Johnson. The outcome of the litigation was not predictable and there was no reason for RFC not to accept payment while the funds were available.

The mere payment of a later creditor (the second loan) before payment to an earlier one (Johnson), in the absence of bankruptcy, is not fraudulent, yet that is the only act upon which Johnson relies to support this counterclaim.

If RFC were vulnerable to the Johnson claim that payments credited to the second indenture were fraudulent, RFC would still be entitled to the payments by simply crediting the amounts to payment of the earlier debt, secured by the first mortgage. The best Johnson could hope for would be the reduction of the earlier debt to approximately $300,000 and the reestablishment of the debt under the second mortgage with its claim in between. It would not make the Johnson claim prior to the first RFC mortgage.

(b) Action on the fourth cause of counterclaim is barred.

The cases hold that discovery is not actual knowledge; discovery is sufficient notice or knowledge to put a prudent man upon inquiry which would have led to a knowledge of the facts. *Lee v. Hensley,* 103 C.A. 2d 697, 230 P.2d 159; *Hobart v. Hobart Estate Co.,* 26 C.2d 412, 436, 159 P.2d 958.

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such facts." Calif. Civil Code Sec. 19.

The facts are that Johnson knew that Tuolumne and RFC had executed the second indenture and chattel mortgage. It had legal notice of the fact by virtue of the recordation of the second indenture immediately after its execution. Actual knowledge of the fact in January, 1940, five months before the repayment began, is admitted.

Johnson also knew or should have known that Tuolumne was receiving the profits of its operations and was applying them to its debts to RFC, for Johnson had agreed to be bound by the system under which Tuolumne's income had to be placed in the trust fund set up primarily for repayment of RFC debts. When Johnson had the additional knowledge of the second loan and of the continued operations by Tuolumne and at the same time was party to two lawsuits against Tuolumne in which the very amounts now sought from RFC were attempted to be collected from Tuolumne, it had notice or information of circumstances which should have put it on inquiry. That inquiry, if followed, would have led to full knowledge of the fact that Tuolumne was repaying RFC the second loan. A prudent man would have been put upon inquiry under those circumstances and that was a sufficient notice to start the running of the statute of limitations against Johnson's fourth cause of counterclaim.

Johnson admits that it knew of payments by Tuolumne to RFC in 1940 or 1941. (See Johnson's answer to interrogatory No. 60, Tr. 111, 122.) Failure to begin an action against RFC for nine or ten years after such knowledge is an inexcusable delay.

Johnson asserts at page 64 of its brief that RFC did not "repudiate" its supposed constructive trust until after Johnson had acquired a judgment against Tuolumne in 1949. Certain statements in the affidavit of Mr. Johnson are relied on. However, Mr. Johnson's affidavit, like the Johnson brief, ignores the documentary evidence which has been admitted to be authentic. The correspondence attached to the Request for Admissions shows that it is not

true that Johnson was delayed by any representation by RFC. The exchange of letters between RFC and Johnson after every conference to which Mr. Johnson and the other affiants refer negatives in every instance any promise or representation to Johnson. In no letter written by the RFC is there the slightest intimation that it would pay Johnson anything or that RFC desired that Johnson delay in protecting any rights it may have had. The most that can be found is an occasional statement that RFC would not attempt to interfere if Tuolumne chose to pay Johnson. Inasmuch as Johnson has not attempted to make any showing that the letters do not mean what they say or that they can be explained away in any other way, they must be believed, and no question of fact concerning them has arisen. Therefore, there is no reason why the statute of limitations on this particular claim did not begin to run at the moment RFC received money from Tuolumne. That being the case, Johnson's action is now barred.

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S FIFTH CAUSE OF COUNTERCLAIM

The fifth cause of counterclaim is either a common count for money or else an action for breach of contract. It is alleged that Johnson paid sales taxes on the dredge and that Tuolumne is obligated to reimburse it under the construction contract. That obligation is to be found in Article XIII of the Johnson-Tuolumne agreement wherein it is stated that any taxes required to be paid "* * * are to be paid by the first party (Tuolumne) and not be considered as a part of the maximum guaranty price heretofore set forth, but shall be put into said revolving fund in addition to the maximum guaranteed price * * *" (Tr. 204)

The obligation arose at the same time as other obligations under the contract, September 24, 1938, when the dredge was delivered.

Payment into the revolving fund referred to the revolving fund which existed during the period of construction of the dredge. It was furnished with funds from the construction fund, from which payments were made to Johnson prior to September 24, 1938. If that is not the due date of the sales tax, it was due at the time of denial by the State of California of Johnson's protest against the tax, which occurred at least as early as February, 1941. (See Exhibits, 6, 7, 8, 9 and 12 attached to Requests for Admissions.)

The last exhibit referred to is a copy of a letter from Johnson to Tuolumne in which one of many demands was made on Tuolumne for payment.* In exhibit 13 attached to the Request for Admissions, the letter dated January 13, 1943, Johnson again stated its expectation that Tuolumne would pay the sales tax. Some months prior to that letter Johnson filed suit against Tuolumne for the sales tax.

(a) The sales tax is no obligation of RFC.

The theory upon which Johnson counterclaims against RFC for the sales tax is mystifying. There is no allegation of a written or oral agreement to which RFC is a party, upon which it could be based. Rather, it is stated that plaintiff RFC "* * * admitted the amount of such tax as above alleged was due and payable to Johnson under the [construction] contract * * *" Then it is concluded that the sum is due from plaintiff to Johnson "for the reasons hereinbefore alleged," none of which reasons relates in any way to the alleged sales tax obligation.

The simple fact of the matter is that Johnson has failed to state a cause of action against RFC for the sales tax and by the admitted facts has demonstrated that it cannot. Even if it were true

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*It is interesting to note that in this letter Johnson took the position that it built the dredge as an agent for Tuolumne. That is inconsistent with any of the legal theories of the counterclaim.

that RFC had admitted that the sum was due Johnson under the construction contract, RFC was not a party to that contract. The admission, whatever its terms, is a legal nullity. Contracts are not made by one party admitting that a third party owes some money. Furthermore, the construction fund was not intended to cover the sales tax except as that debt took its place among many others. It was due from Tuolumne to Johnson but was not a charge against the construction fund any more than any other debt of Tuolumne.

The actual relationship of the parties regarding the sales tax is quite clear from the correspondence attached to the Request for Admissions. On January 27, 1943, (Exhibit 14) RFC stated it would give consideration to any requisition or recommendation *of Tuolumne*. On June 30, 1944, (Exhibit 15) Johnson stated that at the time the construction contract was drawn it was not known whether or not sales tax would be paid by Tuolumne. That letter was replied to on July 29, 1944, (Exhibit 16) and liability was denied by RFC.

If a complaint wholly fails to state a claim for relief, an appellant is in no position to complain about a summary judgment.

The evidence before the Court, like the pleading itself, is barren of any promise of RFC, supported by consideration, to undertake as its own the sales tax obligations of Tuolumne. In a word, this cause of counterclaim is frivolous.

(b) The sales tax claim is barred.

We have shown that the sales tax obligation arose no later than nine years before the counterclaim was filed. It is barred on that account. The allegation that RFC admitted, within four years before filing the counterclaim, that the amount was due Johnson under the construction contract is not an admission of any liability of RFC and could not affect the running of the statute against any claims against RFC.

RFC IS NOT ESTOPPED TO RAISE DEFENSES OF STATUTE OF LIMITATIONS AND LACHES

The question of estoppel relates to several of Johnson's assertions. It has been reserved for discussion at this point to avoid repetition.

Johnson's claims rest, ultimately, on the theory that, considering everything from its own point of view, equity ought to save it from any loss and should compel the government and Tuolumne to bear all the losses of the unfortunate dredging venture. In order thus to shift all of the risk it is presupposed that the government was required to protect Johnson's interests in a paternal sort of way and that Johnson itself could imprudently rely on misconceptions gleaned from conversations with government employees, without investigation of the legal authority of such employees to make representations binding upon the government, and even though Johnson's misconceptions were uniformly contradicted by correspondence between Johnson and RFC shortly following all of the conversations.

The air of injured innocence assumed by Johnson does not faithfully illuminate the facts, but in any event there is no basis for legal liability, particularly against the government. Those who do business with the government must protect themselves by ascertaining, before relying on alleged representations of government employees, that the employees have authority to make them. The government is not to be made the prey of those having purported equitable claims, which are outwardly plausible but have no origin in any legally enforceable commitment by one authorized by law.

As stated by Justice Frankfurter in *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380 at p. 383:

> "It is too late in the day to urge that the Government is just another private litigant for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition

> with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Attempts to pin liability on the government and to estop it from asserting rights and defenses have been the subject of other United States Supreme Court decisions which have consistently upheld the theory that the conduct or statements of employees do not estop the government. See, for example, *Utah Power & Light Co. v. United States,* 243 U.S. 389 at 408 and *Pine River Logging Co. v. United States,* 186 U.S. 279 at 291.

The government is generally in a favored position with respect to claims of waiver, estoppel, laches, statute of limitations and the like. Laches is not imputable to the United States when it has a direct pecuniary interest in the subject of litigation. *United States v. Summerlin,* 310 U.S. 414, (1946); 5 *Cyc. of Federal Procedure,* Sec. 1530. A limitation against the government must be strictly construed in favor of the government. *Dupont, etc. v. Davis,* 264 U.S. 456, 462 (1924); *McCarthy v. Comm'r. of Int. Rev.,* 80 F.2d 618 (C.A. 9, 1935). The government is generally not subject to the statute of limitations on a suit of debt. *United States v. Dobbins,* 139 F.2d 169, (C.A. 5, 1943). No prescriptive title to land can be gained against the government. *Niagara Falls Power Co. v. Federal Power Com.,* 137 F.2d 787, 791, (C.A. 2, 1943); *Pavell v. Berwick,* 48 F.S. 246 (D.C. La. 1943).

Similarly, as in the first cases cited in this section, it is held that those who assert an estoppel against the government must determine at their own risk whether or not the government employee upon whose representation they purport to rely has authority to bind the government. An estoppel against the government is not easily raised.

Cases cited by Johnson concerning estoppel are either irrelevant or distinguishable. In *RFC v. Menihan Corp.,* 312 U.S. 81, it was simply held that RFC could be held liable for costs under a rule which specifically allows costs. *Keifer & Keifer v. RFC,* 306 U.S. 381, holds that a subsidiary corporation of RFC could be sued because the statute creating RFC authorized suits against it. No question of estoppel was considered. In *RFC v. Childress,* 186 F.2d 698 (C.A. 8, 1950) it was held that RFC was bound by an act of an employee who was authorized to represent the government and act on its behalf. No question of estoppel was involved. *United States v. Shofner, etc.,* 71 F. Supp. 161 (D.C. Ore., 1947) merely holds that RFC must sue in its own name rather than in the name of the United States.

United States v. D. & R. G. W., 16 F.2d 374 (C.A. 8, 1926) holds that the United States may waive a claim to a forfeiture and thereafter be estopped from asserting it. The case is not concerned with the problem of the necessity for statutory authority where it is claimed that some individual employee performed an act or made a statement allegedly giving rise to an estoppel, which is the Johnson claim. In *Dayton Airplane Co. v. United States,* 21 F.2d 673 (C.A. 6, 1927) the court distinguished between (1) officers of the government who must find in a statute clear authority for every act and (2) actions of the government through officers who are not limited by any statute but have unlimited discretion. Rules of estoppel and fair dealing apply in the second situation, according to the court, but where contracts are made with officers of the first type (such as employees of RFC) a mem-

ber of the public is charged with knowledge that it is dealing with an agent of known limited power. When the agent acts beyond those powers the principles of estoppel have no application against the government. *Branch Banking & Trust Co. v. United States,* 98 F. Supp. 757 (Ct. Cl., 1951) is to the same effect.

In *The Falcon,* 19 F.2d 1009 (D.C. Mo., 1927) it was held that the immunity of the United States from a defense of laches or statute of limitations may be lost by it in a case where it is only a formal party and a remedy sought in its name is really for enforcement of a right for the benefit of a private party. Generally the immunity is not lost except by Act of Congress clearly manifesting such purpose.

Cases invoking estoppel or waiver by state or municipal officials stand on the law of the particular state and need not be discussed.

United States v. Capital Transit Co., 108 F. Supp. 348 (D.C. D.C., 1952) was an action by the government for a tort and the defendant counterclaimed under the Tort Claims Act. A motion to dismiss the counterclaim was denied, although an independent action would have been barred by the statute of limitations. The court admitted no authority in point could be found; it assumed that the entire matter should be fully litigated because both the claim and counterclaim arose from the same accident. The decision may have merit if limited to its own facts. It is clearly different from the present one. RFC brought suit here against Tuolumne on unpaid notes of Tuolumne and to foreclose on property of Tuolumne. Suit was not brought primarily against Johnson. Johnson was merely a formal party, required to be named because of its claims against Tuolumne.

Johnson also cites three cases (Opening Brief, p. 36) on a theory that RFC was a guarantor of some Tuolumne debt to Johnson. In each of the cases a premature suit was brought on an express written guarantee. There is nothing of that nature to be found in this case as there is no contractual relationship between RFC and Johnson.

The arguments on estoppel are also answered by two cases overlooked by Johnson. In *Farm Security Administration v. Herren,* 165 F.2d 554 (C.A. 8, 1948) it is pointed out (p. 564), with numerous authorities cited, that persons dealing with an agent of the United States are charged with notice of the limitations of his authority. And in *RFC v. Martin Dennis Co.,* 195 F.2d 698 (C.A. 3, 1952), the RFC is found to be entitled to the protection of these rules. The latter case involved reliance on representations of employees and it was held that an estoppel would not be effected.

Johnson made no attempt either by way of affidavit or by way of legal authority to show that anyone *authorized by law* made any representation upon which Johnson was entitled to and did rely and was thereby induced to allow the statute of limitations to run before filing an action.

It is not urged that there can never be an estoppel against the government, but the situations allowing it are very restricted, especially when the estoppel is predicated upon acts of government employees which are not shown to be within their powers. See *First National Bank v. United States,* 2 F. Supp. 107 (D.C. Mo., 1932); *Dayton Airplane Co. v. United States,* supra, and generally on the question, Annotation, 2 ALR 2d 338 to 344.

Finally, the circumstances alleged by Johnson in the affidavits on file fall far short of an estoppel. There is no clear acknowledgment of a debt owed by RFC to Johnson or promise that the statute of limitations would be waived. Johnson was well aware that there was strong opposition to payment to it by RFC and in the correspondence any commitment was repeatedly refused. Too little has been shown to bring into operation the doctrine of estoppel. See *Howard University v. Cassell,* 126 F.2d 6 (C.A. D.C., 1941), cert. den. 316 U.S. 675 and 711. If Johnson had more to substantiate its claims, it had a duty to make a showing to the District Court.

THE JUDGMENT GRANTED ON THE RFC COMPLAINT DISPOSES OF ALL ISSUES AND IS RES JUDICATA

As was pointed out at the beginning of this brief, Johnson has appealed only from the judgment rendered against it on its counterclaim and has not appealed from the judgment rendered in favor of RFC on the latter's complaint. The second judgment has become final. It disposed of all the issues in the case because Johnson's answer to the complaint incorporated each and all of the allegations of the counterclaim by reference. (Tr. 77)

The judgment on the complaint was granted and became final after the judgment from which this appeal has been taken. It is a fact occurring since the judgment on the counterclaim, but it must be considered. The Court should dispose of the case on the facts as they now appear. The Court cannot escape reality by deciding the case upon a statement of facts which has become fictitious. The judgment settling the rights of the parties, granted on the complaint, involved the same facts and issues involved in the counterclaim. It cannot be set aside and cannot be disregarded. The judgment is a fact which irrevocably changes the contest on this appeal before this Court. That fact alone requires affirmance of the judgment on the counterclaim and makes it impossible for Johnson to recover on the counterclaim, even if summary judgment had been improperly granted.

The United States Supreme Court has recognized that factual matters, just as changes in the law, must be considered during an appeal. An appellate court has power not only to correct error in a decree of a lower court *but to make such disposition of the case as justice may require at the time, and in determining this question the court must consider changes in fact and in law which have supervened since the entry of such decree. Watts, Watts & Co. v. Unione Asutriaca di Navigazione,* 248 U.S. 9.

On some occasions the Supreme Court has remanded cases to lower courts for consideration by such courts of changes in law

or fact which have occurred since the entry of judgment. See *Villa v. Van Schaick,* 299 U.S. 152; *Walling v. James V. Reuter Inc.* 321 U.S. 671; *Patterson v. Alabama,* 294 U.S. 600; *Busey v. District of Calif.,* 319 U.S. 579; and *Latimer v. Cranor,* 205 F.2d 568 (C.A. 9, 1953). However, remand for reconsideration by a lower court is unnecessary where the facts and the legal effect are plain and the appellate court may make such disposition of the case as justice may require at the time it has the case before it.

In the exercise of appellate jurisdiction there is room not only to correct error in a judgment under review but to make full disposition "and in determining what justice does require, the Court is *bound* to consider any change either in fact or in law, which has supervened since the judgment was entered." *Patterson v. Alabama,* supra (emphasis supplied).

The supervening fact in this case, of which the Court must take account, is the judgment entered on RFC's complaint. The controversy now before the Court has already been decided and, under the principles of res judicata, that decision is binding. The same issues cannot be tried again. It is a generally accepted precept "that a party who has had one fair and full opportunity to present a claim and has failed in that effort should not be permitted to go to trial on the merits of that claim a second time." *Bruszewski v. United States,* 181 F.2d 419 (C.A. 3, 1950) cert. den. 340 U.S. 865.

> "* * * The general principle back of the rules of res judicata has received recent and clear statement by the Supreme Court. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.' * * * A litigant is to have his day in court, but only one day in court, against another." *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82, 84 (C.A. 3, 1941).

Johnson has had its opportunity to litigate all issues raised by its counterclaim at the hearing on the motion for summary judgment on the complaint. When the motion was granted and judgment was entered, Johnson could have appealed and obtained a review, the same review which it seeks only on the earlier judgment against it on the counterclaim. Inasmuch as one judgment on the issues has become final, opportunity cannot be given to relitigate what has already been decided.

CONCLUSION

We have demonstrated that the judgment of the District Court must be sustained "on the merits" on each cause of counterclaim; that the judgment can also be sustained on the defenses of the statute of limitations and laches, if the latter be considered applicable; that the government is not estopped to assert such defenses; and, independently of the merits of any of the causes of counterclaim or the merits of the defenses referred to, that the judgment rendered in the District Court on the RFC's complaint finally and conclusively determines the rights of the parties. That judgment having become final this appeal is moot and the judgment of the District Court may be affirmed on that ground alone.

Respectfully submitted.

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